United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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74-1517

To be argued by
MICHAEL C. EBERHARDT

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1517

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVATORE THOMAS BADALAMENTE and
HERBERT YAGID,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Salvatore Thomas Badalamente and Herbert Yagid appeal from judgments of conviction entered on April 11, 1974, in the United States District Court for the Southern District of New York after a five day trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 73 Cr. 471, filed May 21, 1973, charged Jerry Allen, Salvatore Thomas Badalamente, Arthur Berardelli, James Feeney, Louis Stern (also known as Louis Rush), Leonard Turi and Herbert Yagid in two counts with conspiracy to transport in interstate and foreign commerce falsely made, forged, altered and counterfeited passbooks and certificates of deposit obtained from various banks within the United States in violation of Title 18, United States Code, Section 371, and with interstate transporta-

tion of a falsely made, forged, altered and counterfeited American Savings Association passbook and certificate of deposit in violation of Title 18, United States Code, Sections 2314 and 2.

On March 4, 1974 the trial of the defendants Badalamente, Yagid and Stern commenced.*

On March 8, 1974, the jury found the defendants Yagid and Stern guilty on both Count One and Count Two. The jury also found the defendant Badalamente guilty on Count One.**

On April 11, 1974, Badalamente was sentenced to one year imprisonment, Yagid was sentenced to two years imprisonment on both counts to run concurrently, and Stern was given a five year suspended sentence under the condition that he reside in a community treatment center.***

Badalamente and Yagid are at liberty pending this appeal.

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* The defendant Turi pleaded guilty to Count One of the indictment on November 12, 1973. The defendant Berardelli pleaded guilty to Count One on February 28, 1974. The defendant Allen pleaded guilty to Count One on March 4, 1974. The case against the defendant Feeney was dismissed on the motion of the Government. An order of nolle prosequi dismissing the case against Feeney was filed on March 8, 1974.

** The Government had moved to dismiss Count Two against Badalamente at the outset of the trial.

*** On April 16, 1974, the defendant Turi was sentenced to two years probation and the defendant Berardelli was sentenced to three years probation. The defendant Allen remains to be sentenced pending the resolution of other criminal cases that remain open as to him.

Facts

The Government's Case

Herbert Olsberg, a private citizen cooperating with the Federal Bureau of Investigation, appeared as the principal witness for the Government. Olsberg testified about his relationship with the Federal Bureau of Investigation, monies which he received from the Federal Government and his past criminal record (Tr. 62-66). Olsberg further testified that in late February 1973 he first came into contact with defendants Yagid and Stern (Rush) regarding a legitimate real estate transaction in New Jersey. Subsequently, in early March 1973, he met Badalamente in connection with the same deal. Olsberg was a "finder" in this transaction and was to be paid a commission of $46,370 if the deal was consummated (Tr. 67-70).

On March 6, 1973, Yagid, in the presence of Stern, introduced another deal to Olsberg concerning a fictitious passbook drawn on a West Coast bank in the amount of approximately $940,000. Yagid advised Olsberg that the deal had come to Yagid through another party and this passbook was the result of placing a fictitious account through a computer and then having a bank officer issue a backdated passbook. Yagid inquired into the possibility of using this passbook as collateral for a loan (Tr. 72). Olsberg said that he would have to see the passbook before he could determine whether it could be used as collateral for a loan. Yagid and Stern stated they would set up a further meeting with their associate to discuss the matter further (Tr. 72). After the March 6 meeting, Olsberg advised the Federal Bureau of Investigation of the fraudulent passbook scheme that had been related to him by Yagid (Tr. 73).

On or about March 9, 1973, at a meeting at the Luxor Baths in New York City, Arthur Berardelli, the holder of the passbook, and Jerry Allen were introduced to Olsberg

by Yagid and Stern (Tr. 74). Berardelli advised that he had a fictitious passbook in the amount of $943,000 from the Home Savings and Loan of Los Angeles, California. Berardelli asked if the passbook could be used as collateral for a loan (Tr. 74-76). Again Olsberg stated that he would have to see the passbook before deciding if he could undertake the negotiation of the passbook. Yagid indicated that it would be his responsibility to put up front money to get the deal off the ground (Tr. 77). Allen asked Olsberg what Olsberg could do with passbook and Olsberg stated that if the passbook was "good" he would probably take it to Switzerland (Tr. 77). There was a discussion of the split of any proceeds realized from the anticipated deal and Yagid and Stern indicated that they would have to discuss the split with "their partner who sits across the river". A tentative 50-50 split was agreed upon between the Berardelli group and the Stern (Rush) group (Tr. 78).

On March 10, 1973, Yagid called Olsberg to advise Olsberg of a meeting to be held at the Statler-Hilton at which time Berardelli would introduce another individual. Yagid inquired as to how Olsberg would do the deal if the passbook was good and how the funds realized from the deal could be brought into the United States. Yagid stated that he needed answers to these questions so that Stern (Rush) could advise the man "across the river" (Tr. 79-80).

Later on March 10, Stern, Yagid, Berardelli and Olsberg met with James Feeney at the Statler-Hilton. Feeney was introduced by Berardelli. There was another discussion about the fictitious nature of the passbook. Olsberg again stated that he wanted to see the passbook. Feeney stated that he would make arrangements for Olsberg to see the passbook. Yagid then advised that the 50-50 split was acceptable, but when Olsberg inquired about his percentage Yagid and Stern responded that they would first have to speak to their "partner across the river" (Tr. 82). At the Statler-Hilton meeting there was also some discussion about

a legitimate letters of credit deal in which Feeney was interested (Tr. 83).

On March 12, 1973, Yagid and Stern again discussed the passbook deal with Olsberg and advised Olsberg that the deal was now on record with the "man who sits across the river." Feeney then arrived and indicated that he was attempting to set up a meeting with a banker in Los Angeles to view the Home Savings and Loan passbook. Feeney stated that if this particular passbook was not available then the passbook would come from one of five other banks in California (Tr. 83-85).

In a phone call on March 15, 1973, Yagid related to Olsberg a plan to fly from New York to Los Angeles, back to New York, and then to Switzerland with the passbook being used as collateral for a loan in Switzerland (Tr. 85-86).

On March 16, 1973, Yagid and Olsberg flew to Los Angeles where Feeney was to advise Yagid and Olsberg of the arrangements to see the passbook in Los Angeles (Tr. 86). Instead they heard from Berardelli who stated that the California deal was off but that they could see the passbook when they returned to New York (Tr. 88).

On March 19, 1973, Yagid called Olsberg and advised that Berardelli would arrange for a new meeting to see the passbook. A subsequent phone call from Yagid on March 19 resulted in arrangements for a meeting on March 20 at the Luxor Baths (Tr. 89).

On the morning of March 20, 1973, Yagid visited Olsberg at Olsberg's apartment. Yagid indicated his displeasure that the passbook deal had not come off in Los Angeles (Tr. 91).

On the evening of March 20, 1973, Berardelli, Stern, Yagid and Olsberg met again at the Luxor Baths. Berar-

delli told Olsberg that he had the passbook but that he was bringing in Leonard Turi from the Midwest to coordinate the deal (Tr. 93-94).

On March 21, 1973, in a recorded phone conversation (GX 15), Yagid and Olsberg discussed the anticipated arrival of Turi with the passbook (Tr. 97). Later the same day, Olsberg met with Allen, Yagid and Stern (Rush) at the Luxor Baths and they again discussed the possibility of seeing the passbook when Leonard Turi arrived from Chicago (Tr. 98-99).

On March 22, 1973, Turi arrived at La Guardia Airport where he met with Berardelli, Feeney, and Olsberg. Turi and Berardelli discussed showing Olsberg the passbook at a later time and went on to discuss the transfer of the money from Europe and the authentication of the passbook from the issuing institution. Again Olsberg made it clear that he would not do anything until he saw the passbook (Tr. 101-102).

Later on March 22, 1973, Olsberg met with Turi, Berardelli and Yagid at the Westberry Hotel in New York City. In a recorded conversation (GX 16) there was discussion as to the following: the date to be placed on the letter authenticating the passbook, the proper language for the authenticating letter, the back-dating of the passbook, the name to be placed on the passbook and the amount of money to be reflected by the passbook. There was also discussion as to when Olsberg could view the passbook and the arrangements for negotiating the fictitious passbook as collateral for a loan from a Swiss bank. Turi also voiced concern over being caught by law enforcement personnel (Tr. 112).

On March 23, 1973, Olsberg received a phone call from Yagid who advised Olsberg that they were going to Fort

Lee, New Jersey where they would meet the "man who sits across the river" at Leo's Restaurant. Yagid stated that they had to discuss the land deal and the passbook deal (Tr. 115). Upon arriving at Leo's Restaurant, Yagid and Olsberg met Badalamente and first discussed the legitimate real estate transaction in which they were involved. With respect to the passbook deal, Badalamente then asked Yagid what had happened since the trip to Los Angeles. Yagid advised Badalamente of Berardelli's call which brought Olsberg and Yagid back to New York and the subsequent meetings at La Guardia Airport and the Westberry Hotel. Badalamente then asked what Olsberg thought of the deal and Olsberg stated that he needed to see the passbook. Badalamente also asked if arrangements had been made to retrieve the funds if the passbook deal went through. Olsberg explained that the funds would come into Fort Pierce, Florida and then be driven to New York by Yagid. Badalamente then discussed the expenses that had to be paid prior to any split of the proceeds. Badalamente then commented that if the deal went through, "it would be a good deal for all of us" (Tr. 117-118).

On March 26, 1973, Stern, Berardelli and Olsberg met at the Luxor Baths and discussed the expenses incurred in connection with the passbook scheme as well as the letter authenticating the passbook. Berardelli advised that his man (Turi) would be coming in soon to display the passbook (Tr. 119-120).

On March 29, 1973, there were three phone calls between Olsberg and Berardelli and two phone calls between Olsberg and Yagid. (These conversations with Berardelli and with Yagid were recorded (GX 17, 18 and 19). The purpose of all of these calls was to discover what arrangements had been made for Olsberg to view the passbook in Turi's possession (Tr. 121-124).

On March 30, 1973, Olsberg met Yagid at the Americana Hotel and Olsberg advised Yagid that Berardelli was un-

certain about where the passbook was coming from but that Berardelli was expecting Turi to come in. Later on March 30, Berardelli, in two recorded phone conversations (GX 20 and 22), advised Olsberg that the passbook was not coming from the Home Savings and Loan, but rather from the American Savings Association of Dallas, Texas. Berardelli advised Olsberg that Olsberg should meet Turi at O'Hare Airport in Chicago where Turi would display the passbook to Olsberg. If Olsberg was satisfied with the passbook then Olsberg would proceed with the loan transaction. Still later on March 30, Olsberg again met Yagid at the Hotel Americana. Olsberg advised Yagid of his phone conversation with Berardelli. Yagid stated that he wished to travel to Chicago with Olsberg in order to see passbook (Tr. 135-136).

On March 31, 1973, Yagid and Olsberg met Berardelli at the Croyden Hotel in New York City. Berardelli advised Olsberg of the time and place of the meeting scheduled for later the same day at the airport in Chicago. Berardelli also discussed plans to pick up the proceeds of the deal in Fort Pierce, Florida and return by car to New York. Berardelli also gave Olsberg a $1,500 check (GX 24) to give to Turi if Olsberg was satisfied with the passbook (Tr. 138-139).

When Olsberg arrived in Chicago on March 31, 1973, Yagid, who had arrived on an earlier flight, informed Olsberg that the "heat" (law enforcement personnel) were at the airport and that Olsberg should leave Chicago immediately. Olsberg then returned to New York (Tr. 142-143).

Early on the morning of April 1, 1973, Olsberg, in a recorded phone conversation (GX 26), discussed with Berardelli the unsuccessful effort to see the passbook on the previous day at the Chicago Airport. Later on April 1, 1973, Olsberg met with Berardelli at the Croydon Hotel and again discussed the previous day's activities. They also placed a phone call to Turi who stated that Yagid had also advised him (Turi) that law enforcement personnel

were at the airport. Turi then stated that he would come to the airport (Newark) the next day so that Olsberg could view the passbook and related documents held by Turi (Tr. 145-147).

Still later on April 1, Olsberg met with Yagid who was concerned over the events at the Chicago airport. Yagid displayed particular concern over whether James Feeney could be trusted. Yagid stated that he and Stern (Rush) would check out Berardelli's relationship with Feeney and Turi to ensure Olsberg's protection (Tr. 148). During the evening of April 1, in two recorded telephone conversations (GX 27 and 28), Berardelli advised Olsberg of the exact time and place of Turi's arrival by plane (Tr. 149-150).

On April 2, 1973 Olsberg met Turi at the Newark airport and they proceeded to a nearby Holiday Inn (Tr. 151). Turi tore the lining from his jacket and removed the American Savings Association passbook (GX 5), a letter to the Swiss bank (GX 4), and a certificate of deposit from the American Savings Association (GX 6) (Tr. 152). Turi was then arrested by an agent of the Federal Bureau of Investigation (Tr. 153).

The Government also called Jerry Allen as a witness. (Allen had pleaded guilty to Count One of the Indictment on March 4, 1974). Allen testified that he had signed an agreement which reflected his current relationship with the Government (GX 30). With respect to the passbook deal, Allen testified that Arthur Berardelli first suggested it to him in the summer of 1972. Allen testified that he didn't hear of the passbook deal again until January or February of 1973 when Berardelli indicated that he wished to use the fraudulent passbook to effectuate a loan (Tr. 316). After this conversation with Berardelli, Allen contacted Yagid and Stern with the possibility of effectuating the loan through them. Allen indicated that his European contacts would not lend money on the passbook (Tr. 317). After

advising Yagid and Stern of the availability of the passbook in Berardelli's possession, Yagid and Stern suggested setting up a meeting (Tr. 318). Allen testified that he set up a meeting at the Luxor Baths between Berardelli and Yagid and Stern which Allen did not himself attend. Sometime thereafter Allen advised Yagid that his (Allen's) Swiss bank contacts would not handle this passbook. Yagid responded that he would reach out for someone who could handle the deal (Tr. 320). Then in the second week of March 1973, Allen testified that he was first introduced to Herbert Olsberg at a meeting at the Luxor Baths also attended by Berardelli, Yagid and Stern (Tr. 320-321). During this meeting the passbook was discussed as well as the split of the profits, verification of the passbook and the possibility that they could all end up in jail if the deal went bad (Tr. 322). Allen also testified as to a second meeting with Berardelli, Yagid, Stern and Olsberg at the Luxor Baths during which there was a discussion of expenses that would be incurred and the payoff that would result if the deal was successful (Tr. 323).

As part of its case the Government also called Special Agent Ford Cole of the Federal Bureau of Investigation who testified as to various conversations in which Olsberg participated on March 20, 21, 22 and 31, 1973. Agent Cole overheard these conversations by means of electronic monitoring (Tr. 336-350). The Government also called Special Agent William Fleisher who testified as to the relationship between Herbert Olsberg and the Government. Fleisher indicated that Olsberg had served as an informant for Fleisher in approximately a dozen different cases (Tr. 354).

The Government also called bank officials from the American Savings Association, Dallas, Texas to establish the fact that the passbook and certificate of deposit recovered from Turi on April 2, 1973 were in fact stolen and forged. There were no bank records reflecting the issuance

of a passbook (GX 5) or certificate of deposit (GX 6) in the amount of $943,000 to any individual named Walter Reitman, the name appearing on the documents. The authorizing signature by the appropriate bank official on both documents was also established to be a forgery (Tr. 45-56).

The Defense Case

A. Yagid

Herbert Yagid took the stand in his own defense. He stated that he was initially brought into contact with Olsberg in January 1973, in relation to a land deal (Tr. 378-380).

On February 27, 1973, Yagid testified that he met at the Luxor Baths and Allen told him about a California bankbook held by Berardelli which might be used to establish credit (Tr. 387). Yagid stated that he wanted no part of such a deal (Tr. 388).

On March 5, Olsberg came to the Luxor Baths. There was a brief conversation concerning the land transaction and then Yagid related the plan which had been presented by Allen the previous week (Tr. 389-390). Olsberg returned to the Baths later that afternoon desiring to pursue the discussion of the Allen deal. Yagid again indicated apprehension about the deal, but he agreed to arrange a meeting between Olsberg and Berardelli (Tr. 391-393, 397).

Yagid claimed that he and Stern were coerced into taking part in subsequent meetings. Olsberg was adamant in his insistence and threatened to call off the land deal if they refused (Tr. 400-445). Finally on March 20, 1973, Stern demanded that he and Yagid be paid for their work if the passbook deal came through (Tr. 449). Olsberg and Stern agreed that from then on the three should be con-

sidered partners. Yagid admitted to his joining the conspiracy at that time (Tr. 509).

Yagid then testified about several meetings between March 20 and March 31, including the March 22 meeting at the Westberry Hotel in which the fraudulent passbook scheme was discussed at length and the March 31 meeting in which Berardelli gave Olsberg the $1500 check for delivery to Turi (Tr. 455-475).

On March 31, 1973, Yagid flew to Chicago to be present when Turi showed the passbook and other documents to Olsberg (Tr. 476). He spotted what he thought were law enforcement agents at the airport (Tr. 477). When Olsberg arrived, Yagid told him to return to New York at once (Tr. 481).

Yagid and Olsberg returned from Chicago on April 1 on different flights. When Olsberg called Yagid early that morning, Yagid said that he wanted nothing more to do with the deal (Tr. 482). He repeated that position in a meeting later that day, at which time he also stated that Stern was withdrawing from the deal (Tr. 485-486).

On cross-examination Yagid admitted that he first learned of the passbook deal from Jerry Allen and that he knew the deal was illegitimate from the beginning (Tr. 500-501). Yagid questioned why Olsberg wanted any part in this kind of situation (Tr. 506). He denied taking part in subsequent discussions of the deal although he was present at these meetings (Tr. 506). However, Yagid conceded that beginning March 20, he, Stern and Olsberg would be partners and that he expected to be enriched by the illegitimate deal (Tr. 510, 523).

On March 23, 1973, Yagid and Olsberg met with Badalamente to discuss the New Jersey land deal. According to Yagid, at no time was the issue of the passbook deal raised (Tr. 514).

Yagid went to Chicago with Olsberg in order to help prevent a later switch of passbooks. When Turi and Olsberg arrived at the airport, Yagid told each to leave because of the presence of law enforcement agents (Tr. 520-521). On April 1, after returning from Chicago, Yagid informed Olsberg that both he and Stern were withdrawing from the passbook deal, partially in fear of being caught (Tr. 528). Yagid stated that he entered the conspiracy on March 20, 1973 and terminated his involvement in the conspiracy after the airport meeting on March 31, 1973 (Tr. 533).

B. Badalamente

The defendant Badalamente called Angelo Cigolini as his only witness. Cigolini testified as to the real estate deal in which Olsberg was involved with Yagid, Stern and Badalamente (Tr. 364-373). Cigolini could offer no testimony with respect to the passbook deal (Tr. 374).

ARGUMENT

POINT I

The issue of whether there was error in the failure of the Government and the trial judge to make available the "Allen letters" is an issue not properly before this Court since no record has been made on this issue by the District Court.

The appellant Yagid contends that the failure of the Government to make available the so-called "Allen letters" constituted a violation of the Government's responsibility under Title 18, United States Code, Section 3500. Yagid further makes the extremely serious allegation that the failure of the trial judge to make available the "Allen

letter" in his possession and his contacts with the United States Attorney for the Southern District of New York constituted a breach of judicial and professional ethics. Yagid finally contends that the trial judge's alleged failure to appreciate the significance of the "Allen letter" in his possession absolves Yagid from the normal requirement of making a motion for a new trial in the District Court based on the discovery of this material which Yagid contends should have been available to him under Section 3500. The Government's position is that the record before this Court is substantially incomplete with respect to the issue of the "Allen letters" and Yagid's attempt to construct a record in his brief may not serve as a substitute for the requirements of Rule 33 of the Federal Rules of Criminal Procedure which requires that a motion for a new trial be directed to the District Court.

Yagid's brief is replete with speculation and surmise. For example, to buttress his contention that the letters would have demonstrated the bias of Allen as an outgrowth of government pressure, Yagid postulates that the letters were written by Allen after his agreement to cooperate with the Government (Brief for Yagid at p. 13). This manufactured sequence is not only based on speculation but also completely ignores Allen's testimony at trial in which Allen testified that he reached an agreement with the Government only shortly before Yagid's trial (March 4, 1974) (Tr. 315) not in late 1973 as Yagid contends. Even more basic, there is no record as to whether trial counsel had the controverted letters in his possession at the trial of Yagid. Nor is there a record as to the circumstances under which any letter was written nor the extent to which any letter relates to the case in which Yagid was tried before Judge Carter.

Given the possible significance of the "Allen letters" and the absence of a proper record in this Court concern-

ing them, the Government submits that the District Court is the appropriate forum for the initial consideration of the issues surrounding their creation, non-disclosure, and importance and would request a remand for that purpose. *Campbell* v. *United States*, 365 U.S. 85, 98-99 (1961); *United States* v. *Brawer*, 482 F.2d 117, 136 (2d Cir. 1973), *on remand* at 367 F. Supp. 156 (S.D.N.Y. 1973), *affirmed in slip op.* 5735 (2d Cir. May 3, 1974); *United States* v. *Addonizio*, 449 F.2d 100, 103 (3d Cir. 1971); *Lloyd* v. *United States*, 412 F.2d 1084, 1088-89 (5th Cir. 1969); see also *United States* v. *Bynum*, 475 F.2d 832, 837 (2d Cir. 1973); *United States* v. *Holmes*, 426 F.2d 915, 919 (2d Cir. 1970), *vacated and remanded on other grounds*, 402 U.S. 969 (1971).

POINT II

The trial judge did not improperly refuse to permit trial counsel to examine the relationship between Olsberg and the Federal Bureau of Investigation.

The appellant Yagid claims that the trial judge's limitation on defense counsel's cross-examination of Special Agent James Maher and Herbert Olsberg improperly restricted inquiry into the relationship between Olsberg and the Federal Bureau of Investigation and that this restriction prevented disclosure of Olsberg's bias and interest. This argument totally ignores the role of Agent Maher, the extent to which Olsberg was cross-examined about his relationship with the Federal Bureau of Investigation and the direct and cross-examination of Special Agent William Fleisher.

Agent Maher testified that he was the case agent assigned to the investigation of this particular case (Tr. 27). Since Olsberg testified that his first contact with the Federal Bureau of Investigation was with Agent William Fleisher (Tr. 207) and since it was Fleisher who super-

vised Olsberg's role as an informant in approximately a dozen investigations (Tr. 354), it was quite proper for the trial judge to restrict the cross-examination of Maher to the facts of the particular case to which Maher was assigned. Indeed, Yagid claims that Maher should have been allowed to answer the following questions:

> Mr. Rao: When was the first time you had contact with Mr. Olsberg?
>
> Mr. Eberhardt: Objection, as outside the scope of direct examination.
>
> The Court: Objection sustained.
>
> Mr. Rao: In connection with your investigation in this matter, did you have occasion to have contact with Mr. Olsberg?
>
> Mr. Eberhardt: Objection.
>
> The Court: Objection sustained (Tr. 40).

In fact these questions were later allowed by the Court and answered:

> Mr. Rao: When was the first occasion you had to meet with Mr. Olsberg in connection with your supervisory capacity of this case?
>
> * * * * *
>
> Mr. Maher: I would say perhaps around the middle of March [1973] (Tr. 41-42).

In effect, there was no real limitation on the inquiry of Maher as to the relationship between the Federal Bureau of Investigation and Olsberg since Maher only dealt with Olsberg in the context of this single case. It was Fleisher who testified that he had known Olsberg since September 1972 (Tr. 354) and it was Olsberg who testified that he began working for the Federal Bureau of Investigation in an undercover capacity in approximately September 1972 (Tr. 62). Olsberg gave testimony about his relationship with the Federal Bureau of Investigation on direct examination (Tr. 62-63) and the trial judge allowed considerable

latitude in the cross-examination of Olsberg with respect to his relationship with the Federal Bureau of Investigation (Tr. 206-207) (Tr. 222-226). Furthermore, all of Fleisher's direct testimony related to Olsberg's relationship with the Federal Bureau of Investigation and Fleisher's cross-examination was completely unrestricted (Tr. 352-357).

Trial counsel was not unduly restricted in his inquiry into Olsberg's bias and interest; Olsberg's prior record, his parole violation, his role as an informant-undercover agent for the Federal Bureau of Investigation and the amounts of money paid to Olsberg were topics that were fully developed for consideration by the jury. *United States* v. *Cioffi,* 493 F.2d 1111, 1118 (2d Cir. 1974).

POINT III

The trial judge properly refused to permit Yagid to testify about conversations between Yagid and the co-defendant Stern.

Appellant Yagid argues that he should have been allowed to testify about certain conversations that he had alone with the co-defendant Louis Stern. Yagid claims that such conversations would have demonstrated that his state of mind was consistent with his entrapment defense and should have been admitted under the traditional co-conspirator exception to the hearsay rule. His argument is without foundation in law or logic.

The co-conspirator exception to the hearsay rule permits declarations of co-conspirators made during and in furtherance of a conspiracy to be offered *against* a member of the conspiracy. Such declarations are received as *admissions* of the person against whom they are offered and their trustworthiness is considered to be based on the fact that they are generally against the penal interest of the non-

testifying declarant. See e.g., Rule 801(d)(2) of the Proposed Rules of Evidence for United States Courts and Magistrates, 41 U.S.L.W. 4030; Wigmore, *Evidence* §§ 1078, 1079 (1972 Chadbourne ed.). Where, as here, a defendant seeks to testify as to exculpatory statements made by a non-testifying co-defendant, the statements are inadmissible hearsay. They lack the trustworthiness of an admission and instead are simply self-serving declarations of dubious reliability attributed to persons who are unavailable for cross-examination. To allow their admission would permit one defendant to testify and to recount any number of alleged exculpatory conversations with his co-defendants, thus putting their unsworn and unconfronted testimonial defenses before the jury without their taking the stand. Such an unwarranted procedure has been soundly rejected. *Shreve* v. *United States*, 103 F.2d 796, 805-06 (9th Cir.), *cert. denied*, 308 U.S. 510 (1939).

In the present case, insofar as Yagid sought to testify as to his own state of mind in order to establish his entrapment defense, he was free to do so. Indeed, the Government's objection and the Court's ruling were directed only at what Mr. Stern said in these conversations with Yagid:

> Q. Then what happened? A. I saw Louis Stern and I told Louis Stern what had happened.
>
> Q. What did you say to Louis Stern? A. I told Louis Stern exactly what had happened.
>
> Q. What did Louis Stern say to you? A. He asked me if I was some kind of a jerk.
>
> * * * * *
>
> Q. Then what happened? A. Louis said——
>
> Mr. Eberhardt: I will object to anything Mr. Stern said unless it was in the presence of both Mr. Yagid and Mr. Olsberg and about which Mr. Olsberg has already testified, otherwise, I submit what Mr. Stern said to Mr. Yagid is hearsay.

> The Court: The objection is sustained. Anything Mr. Stern said about Mr. Olsberg is sustained (398-399).
>
> * * * * *
>
> The Court: . . . You have Mr. Yagid on the stand and Mr. Yagid is purporting to be testifying about something Mr. Stern said. I gather you have already indicated to Mr. Eberhardt that Mr. Stern is not going to take the stand (Tr. 412).
>
> * * * * *
>
> The Court: You are attempting to use this man [Yagid] in terms of a conversation that Mr. Stern said out of Mr. Olsberg's presence, and you can't do it. That is clear . . . (Tr. 413).

Thus, counsel for Yagid was not precluded from having Yagid testify as to his then state of mind. He was not permitted, and properly so, from buttressing his own declarations with the hearsay declarations of his non-testifying co-defendant Stern as to Stern's impressions of or comments on Yagid's state of mind. Had Stern been amenable, he could have taken the stand and testified for Yagid on the subject.

POINT IV

Yagid's claims of error with respect to the Court's charge are without merit.

A. Olsberg's Credibility

Yagid contends that the trial court failed to properly instruct the jury on the credibility of the informer, Herbert Olsberg. This argument is without foundation. Although Judge Carter did not use the exact charge requested by defense counsel, the jury was given adequate standards by which they could evaluate Olsberg's special interest.

First, they were reminded of the previously stated (Tr. 593) guidelines which must be used in evaluating the credibility of all witnesses such as relationship to the parties; bias or interest; demeanor; the presence or absence of corroboration; and internal consistency of their testimony. Thereafter, Judge Carter carefully set forth the additional factors to be considered by the jury in assessing Olsberg's testimony:

> The fact that a person has been convicted of a serious crime, especially one bearing on his veracity, may be considered by you as bearing on his credibility as a witness in this case.
>
> You may consider whether Mr. Olsberg's testimony was a fabrication, inspired by his own motives or *self interest or personal advantage* or induced by a promise or a hope or expectation of favorable consideration by the Government in connection with these or other matters. You should also consider whether Olsberg's testimony was motivated by any hostility towards the defendants.
>
> * * * * *
>
> . . . those factors indicate that you should view his testimony with caution . . . [Tr. 596-597] (emphasis added).

Clearly, this instruction negates any allegation that the jury was left to judge Olsberg by the same standard as that applicable to ordinary witnesses. Moreover, contrary to appellant Yagid's claim, the above language specifically highlighted the "special interests" of Olsberg without using those magic words. By using words such as "personal advantage" the trial court highlighted the repeated testimony and argument in summation concerning Olsberg's status as a paid informant (Tr. 63, 221-226, 242-243, 546, 551, 553, 572, 573) and thereafter emphasized that the special factors present with respect to Olsberg's testimony required that it be viewed with "caution."

While the court may not have used the magic language found in *United States* v. *Masino,* 275 F.2d 129 (2d Cir. 1960) ("the greater care and scrutiny") or in *United States* v. *Hill,* 470 F.2d 361, 365 (D.C. Cir. 1972) ("special interest"), the charge properly instructed the jury with respect to Olsberg's credibility.

B. Yagid's Credibility

Appellant Yagid also contends that the trial court's charge as to Yagid's credibility was legally defective. This argument is without merit. An instruction may properly point out the defendant's special interest in a case. *Reagan* v. *United States,* 157 U.S. 301 (1895). Despite appellant's claims that no court has included in its charge such phrases as "deep personal interest," "greatest stake in the outcome," and others which are directed to the defendant's credibility, the courts have not hesitated in approving emphatic references to a defendant's interest in the case. *Reagan* v. *United States, supra,* ("direct personal interest"); *United States* v. *Mahler,* 363 F.2d 673 (2d Cir. 1966) ("the man in this case with the deepest, greatest interest is the defendant himself"). In *United States* v. *Sullivan,* 329 F.2d 755, 756 (2d Cir.), *cert. denied,* 377 U.S. 1005 (1964) this Court approved the language: "You know that, of course, the defendant is interested—vitally interested—in the outcome of a case, his case." Further, in *United States* v. *Sclafani,* 487 F.2d 245, 257 (2d Cir.), *cert. denied,* — U.S. —, 94 S.Ct. 445 (1973), this Court recently approved the following instruction which is markedly similar to the language complained of here:

> "As the defendant he has a personal interest in the result of the case and such interest creates a motive for false testimony. The greater the interest, the stronger the motive and the defendant's interest in the result of this trial is of a character possessed

by no other witness . . . " (Appellant's Appendix at A-253 in *United States* v. *Sclafani*).

Although the recommended instruction on the credibility of witnesses in Devitt and Blackmar, Federal Jury Practice and Instructions § 2.11 p. 264 (1970) contains no specific reference to the interest of the defendant, the note which accompanies it points out that such reference is not improper. Judge Carter's instruction in no way focused on appellant's interest to a greater extent than the charges in these other cases, which were found to be proper.

The instruction to receive appellant's testimony "with caution" cannot reasonably be construed as advising the jury that such testimony was inherently untrustworthy. Whenever an interested witness' credibility is in issue, his testimony must be weighed with a great deal of care. *United States* v. *Mahler, supra.* In *Gaglio* v. *United States,* 405 U.S. 150 (1972), the jury was required to weigh the credibility of the Government's key witness against that of the defendant to determine whose version to accept. Thus, the court ordered a new trial because the prosecution failed to bring out that its witness had been promised immunity. In contrast, Judge Carter did not single out appellant's interest and ignore the special interest of Olsberg, the main witness against him. Contrary to appellant's allegations, Judge Carter did not treat Olsberg as an ordinary witness. His instructions were expansive and pointed out Olsberg's own self-interest (Tr. 597) and other specific considerations to be made in evaluating his testimony. The jury was properly advised concerning the special interests of both Yagid and Olsberg and had an adequate basis for considering the conflicting testimony.

C. Allen's Guilty Plea

Yagid contends that the court erroneously failed to instruct the jury that Allen's plea of guilty to the charge of

conspiracy was no evidence of Yagid's guilt. While the court's instruction was somewhat less explicit than that requested, it was clearly adequate.

> "You may not assume that a defendant joined a conspiracy simply because you are convinced that he knew or was associated or had dealings with people who conspired to violate the law" (Tr. 606).

Thus, the jury, which was informed that Allen had pleaded guilty to the conspiracy charged in Count One (Tr. 314, 328), was told not to assume from this that the defendants on trial were guilty of conspiracy.

Moreover, any harm which might otherwise be expected to arise from the absence of a detailed instruction on the effect of Allen's plea of guilty was significantly reduced by the fact that Yagid did not deny his involvement in the passbook scheme. Instead, he urged that he had been entrapped by the Government informer, Olsberg. Under these circumstances, Allen's testimony did not take the posture of a confessed conspirator implicating a wholly disclaiming defendant. Rather, Yagid was asserting a defense which the jury had no reason to believe was available to Allen.*

Finally, the fact of Allen's guilty plea was forcefully emphasized by the trial court as a factor which could adversely affect his credibility (Tr. 597) and this was of obvious benefit to Yagid.

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* Allen gave no testimony against Badalamente and Badalamente's counsel did not even choose to cross-examine him (Tr. 336).

D. Entrapment

Yagid finally contends that the trial court's charge did not adequately present the entrapment issue to the jury. This contention is also meritless.

The entrapment issue requires the active participation of a government agent. Appellant requested a charge which would specifically pin the label "government informer" on Olsberg. Instead, the actual charge interchanged several terms ("law enforcement officer," "government employee," "government agent"). Appellant claims that the instruction served to confuse the jury. If anything, this charge is broader in effect than the one requested by trial counsel. It is conceivable that some jurors may have viewed Olsberg's role as employee, while others considered him an agent or law enforcement officer. Rather than confuse the jury, the instruction served to clear up any question concerning Olsberg's role in the passbook scheme.

In addition, when instructing the jury with respect to Olsberg, the trial judge specifically labelled him as "an informant or informer" and stated that "the law permits the use of informers" (Tr. 596). Indeed, when viewing the charge as a whole, Olsberg's role was explicitly set before the jury as that of an "informer".

The additional argument, that references in an entrapment charge to "innocent person" are erroneous, misreads the applicable law. In *United States* v. *Morrison,* 348 F.2d 1003, 1005 (2d Cir.), *cert. denied,* 382 U.S. 905 (1965), the use of such language was criticized, not as a general proposition, but in the case of a defendant whose prior criminal involvement had been brought to the attention of the jury. In that factual setting, the "innocent person" language was thought possibly to have conveyed the notion that the entrapment defense was not available to someone with a previous conviction. Yagid, who had no prior criminal record,

was thus not exposed to the same possibility of jury misinterpretation as had been Morrison (whose conviction was nevertheless affirmed).

Contained as they were in the court's general statement of the policies underlying the entrapment defense, the references to "innocent persons" were wholly proper. They did not mislead the jury into thinking that the defendants at trial were seeking to assert the innocence of their total behavior, but rather focused on innocence *prior to* the alleged government inducement. A charge containing similar language has recently been approved by this Court as a proper exposition of the law. *United States* v. *Rosner,* 485 F.2d 1213, 1221-22 n. 11 (2d Cir. 1973), *cert. denied,* — U.S. — (1974).

POINT V

The evidence was sufficient to establish Badalamente's membership in the conspiracy to transport forged or counterfeit securities in interstate and foreign commerce.

Badalamente contends that there was insufficient evidence to prove his knowing membership in the conspiracy. To the contrary, the evidence established his knowledge of the passbook scheme, his largely concealed but nevertheless important role in directing its details, and his expectation in sharing in its fruits.

Badalamente's central role in the fraud, suggested on several occasions by obedient references to the "man" or "partner across the river" (Tr. 78, 82, 84, 115), was clearly demonstrated during his March 23 restaurant meeting with Yagid and Olsberg.

Prior to the meeting, Yagid told Olsberg that they were going to meet the "man across the river" to discuss both a real estate deal and the passbook deal (Tr. 115). At the outset, Badalamente chastised the waiter in the restaurant for addressing him by name, thus revealing to Olsberg the identity of the hidden silent partner from across the river (Tr. 116). When the conversation turned to the passbook deal, Badalamente displayed an intimate familiarity with its prior chronology. He inquired about what had happened since the trip to Los Angeles which had been made by Olsberg and Yagid to view the illegitimate passbook from the Home Savings and Loan of Los Angeles. Yagid then informed him about the meetings at La Guardia Airport and at the Westberry Hotel. After being briefed, Badalamente made a series of inquiries which the jury could reasonably infer were made in Badalamente's capacity as an interested planner of illegal events, not a disinterested spectator. He asked Olsberg if the passbook deal was "good" and whether Olsberg could "do it". Olsberg replied that he would first have to get a look at the still unavailable passbook. He then asked whether arrangements had been made to "retrieve" the funds and was told of the circuitous route which the funds would travel from abroad to Florida to New York. The capstone of his participation was provided by his joining in the discussion of how and when the proceeds would be divided and his comment that the deal would be a profitable one for "all of us" (Tr. 117-118). This evidence was more than sufficient for a rational jury to conclude beyond a reasonable doubt that Badalamente was a member of the conspiratorial group.*

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*While the trial court may have erroneously applied a "preponderance of the evidence" test in denying the defense motion for acquittal at the close of the Government's case, the evidence clearly met the more stringent requirements of *United States* v. *Taylor*, 464 F.2d 240 (2d Cir. 1972).

Badalamente's additional argument that there was insufficient evidence to support an inference that he knew that the passport which was the subject matter of the conspiratorial agreement was a counterfeit or forged one is equally meritless. Badalamente's brief (p. 23) suggests that he might have thought the deal involved a "valid security interest in a pas book". While such naive speculation might have plausibility with respect to a peripheral actor, the circumstantial evidence was clear and plentiful that Badalamente was a director of the scheme not a flunky who was kept uninformed by the confreres whose guilt he concedes (Brief p. 16). Badalamente, the evidence showed, was the silent partner across the river with whom the illegal passbook deal had to be put on the record (Tr. 76-78, 115). By the time of the crucial restaurant meeting (in Fort Lee, New Jersey), Badalamente (Tr. 115), the jury could find, had been fully advised of all the details based on his familiarity with prior events, his concern with the details of future feasibility and execution, and his dictation of the timing and computation of the eventual distribution of the proceeds. Given the strong proof of his involvement with the other conspirators and the circumstantial evidence of his central role, the total absence of any credible theory of his having played an unknowing role in the passport deal clearly permitted the jury to conclude that his clear cut participation in the conspiracy was a knowing one. *United States* v. *Parness,* slip op. 4429, 4439-40 (2d Cir. June 27, 1974).

Badalamente likens his situation to the factual pattern in *United States* v. *Infanti,* 474 F.2d 522 (2d Cir. 1973), where a reversal of one defendant's conviction (Kurtz) was required due to insufficiency of the evidence. Kurtz, however, had been convicted of the substantive crime of transporting stolen securities and his mere presence at negotiations for the sale of stolen securities without participating in them was deemed insufficient to support the

conviction against him. In contrast, Badalamente was not merely a bystander at the March 23 meeting. He actively sought information on the passbook deal and was brought up to date on the latest events concerning the scheme. Badalamente's references to the splitting of the money, the outlays for expenses, and the fact that he thought the deal would be "good for all of us" clearly establishes his central role in the illegal venture. See *e.g., United States* v. *Marrapese,* 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied,* — U.S. — (1974), ("Once a conspiracy is shown, only slight evidence is needed to link another defendant with it"); *United States* v. *Gimelstob,* 475 F.2d 157 (3d Cir.), *cert. denied,* 414 U.S. 828 (1973); *United States* v. *McGann,* 431 F.2d 1104 (5th Cir. 1970).

POINT VI

Badalamente was not denied the effective assistance of counsel.

Badalamente argues that he was denied the effective assistance of counsel (a) because there was a conflict of interest between his own lawyer representing both him and a co-defendant, Turi, who pleaded guilty prior to trial; (b) because there was a conflict of interest in his being represented by a man who practiced law at the same address as the lawyer representing co-defendants Yagid and Stern; and (c) because his lawyer was incompetent. Each of these claims is without substance.

Badalamente's first claim is that because his lawyer also represented Turi, who had already pleaded guilty, Turi was not called as a defense witness as part of a strategy designed to obtain a favorable sentence for Turi even at the expense of Badalamente. To categorize this claim as speculative gives it more attention than it deserves. How Turi would have jeopardized the lenient treatment he ultimately

received by truthfully exonerating Badalamente is difficult to perceive. The more likely influence of the joint representation of Turi and Badalamente by the same attorney would appear to have been that Badalamente was spared the damaging adverse testimony of a co-conspirator.

Badalamente next argues that his attorney, Mr. Nigrone, failed to give him proper representation because he was in some largely undefined manner "associated with" Mr. Rao, the attorney who represented the two co-defendants at trial and that this association created a damaging conflict of interest. To begin with, the degree of association between Mr. Nigrone and Mr. Rao appears to have been rather tenuous. While both filed notices of appearance listing the same address for their offices (233 Broadway), neither attorney indicated that he was anything other than a solo practitioner (2a). As far as can be determined from a study of the record, the lawyers' references to each other as associates meant nothing more than that they worked in close physical proximity and may have shared office space and a secretary. There is simply no support in the record for the contention that they were institutionally identified with one another in such critical areas as the accepting of clients or the sharing of fees.

Even were the record sufficient to support the assumption that Mr. Rao and Mr. Nigrone were full-fledged law partners, there is no indication that Badalamente's defense was in any manner weakened or prejudiced by that association. Yagid, the most active and visible of the conspirators on trial, sought to establish that he had been entrapped by the informant Olsberg. Badalamente, whose role had been largely hidden from exposure, pursued the obviously best defense of non-involvement. There was simply no antagonism between the defenses let alone antagonism exacerbated by a conflict of interest. Nor was any created by the fact that Yagid testified and Badalamente did not. Where a *single lawyer* represents two (or more) defendants, the

fact that one testifies and the other does not may prejudice the non-testifying defendant in the eyes of the jury more than is the case where each has separate counsel. But in the present case, the appearances presented to the jury were no different from any joint trial where separate counsel make independent decisions as to whether their clients will take the stand. Moreover, the testimony of Yagid was fully exculpatory of Badalamente since Yagid testified that only the real estate deal and not the passbook scheme had been discussed at the restaurant meeting on March 23, 1973. The fact that Yagid exonerated Badalamente left Badalamente free not to testify and to rely on the jury's disbelieving Olsberg and believing Yagid. If for any reason he had wanted to add the force of his own denials to those of Yagid concerning whether there had been any discussion of the passbook deal at the restaurant meeting, he could have done so without damaging Yagid's defense in the slightest. In short, there was no prejudice to Badalamente based on any professional association between his lawyer and Yagid's. *United States* v. *Lovano*, 420 F.2d 769, 772 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970).

Badalamente also claims inadequate representation by second-guessing his trial counsel's actions prior to, during and after trial. However, the record demonstrates that Badalamente's counsel clearly afforded adequate representation to his client. Indeed, the best example of this is the detailed cross-examination of Herbert Olsberg by Badalamente's trial counsel (Tr. 172-197). In fact, Olsberg was the only witness against Badalamente and cross-examination by Badalamente's counsel represented an adequate effort to impeach Olsberg. Trial counsel for Badalamente also made timely motions for a judgment of acquittal after the Government's direct case (Tr. 358-359) and for dismissal of the charges after the defense rested (Tr. 535). Furthermore, Badalamente's counsel engaged in exhaustive pre-trial discovery as evidenced by the transcripts of the

pre-trial conferences on August 3, 1973 and January 2, 1974. Finally, the summation of Badalamente's trial counsel properly indicated that Badalamente's defense rested on non-involvement based on the testimony of the defendant Yagid who testified that there was no discussion of the passbook deal during the meeting of March 23 attended by Olsberg, Badalamente and Yagid. Counsel adequately presented the conflicting versions of that March 23 meeting in his summation (Tr. 544-548). By no stretch of the record can Badalamente remotely claim that his legal representation made the trial a "farce or mockery of justice" or that it was "shocking to the conscience of the Court." See *United States* v. *Sanchez*, 483 F.2d 1052, 1055-59 (2d Cir. 1973); *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311 (2d Cir. 1974).

POINT VII

The trial court properly sustained the prosecutor's objection to a conclusory question asked of Yagid by Badalamente's counsel and did not thereby preclude or restrict his ability to cross-examine Yagid.

Badalamente argues that his right to cross-examine co-defendant Yagid was improperly restricted when the trial court sustained an objection to a single question and Badalmente's counsel thereafter dropped all further efforts at cross-examination (Tr. 496-97).

Yagid was asked if Badalamente had been his "partner" in the illegal enterprise which gave rise to this criminal proceeding. The question not only improperly called for a conclusion, but did so on the ultimate question of Badalamente's guilt or innocence—a matter for the jury to resolve. Badalamente was in no way restricted from rephrasing the question to call for a factual response. For exam-

ple, he could have asked Yagid whether Badalamente was to receive any proceeds of the anticipated loan based on the passbook or whether Yagid had ever told Badalamente that the passbook was counterfeit but he failed to do so. That counsel abandoned his attempts at cross-examination after a ruling which did not purport to restrict the right of cross-examination does not give a defendant a right to a new trial. The authorities cited by Badalamente all involve improper restrictions on the content or style of cross-examination and are thus inapposite.

POINT VIII

The trial court's charge to the jury on the relevant issues pertaining to defendant Badalamente was sufficient and in no event does it constitute plain error.

Badalamente argues that the trial court's charge to the jury erred in failing to elaborate upon Badalamente's defense of non-involvement and to distinguish it from the entrapment-withdrawal defense raised by defendants Stern and Yagid. The argument is without merit.

In a general discussion of legal principles which preceded the charge as to the specific criminal statutes involved, the trial court carefully informed the jury that a defendant is entitled to a presumption of innocence, a presumption which is only overcome by proof of guilt beyond a reasonable doubt (Tr. 595-96). The Court also instructed the jury that it had to consider each count of the indictment separately and determine if the Government had proved its case beyond a reasonable doubt as to each defendant in each count (Tr. 599).

In instructing on the conspiracy charge, the court set out the elements which the jury had to find in order to

convict and told the jury that each element had to have been proved beyond a reasonable doubt (Tr. 603-04). The court specifically told the jury that it had to find "that the defendant whose guilt or innocence [it was] considering knowingly and wilfully became a participant in the conspiracy with knowledge of its alleged criminal purposes" (Tr. 604). Throughout the trial, Badalamente maintained that he did not participate in the conspiracy (Tr. 545). After explicit and proper instruction as to the essential elements of the crime, the jury, by its verdict, rejected that defense.

As to the purported failure of the trial court to adequately distinguish between Badalamente's defense of non-involvement and Yagid and Stern's defense of entrapment-withdrawal, a reading of the record reveals that the court told the jury that the entrapment defense was raised by Yagid and Stern (Tr. 615). Furthermore, in discussing the entrapment-withdrawal defense the judge referred only to Yagid and Stern several times and not to Badalamente. The jury clearly was aware of the fact that the issues relating to entrapment involved only Yagid and Stern and did not relate to Badalamente.

Although Badalamente's counsel joined in several exceptions to the charge raised by co-defendants' counsel, he did not express any dissatisfaction with the charge as to the point now pressed on appeal (Tr. 623-26). *United States* v. *Brawer,* 482 F.2d 117, 130 n. 18 (2d Cir. 1973). There was no failure to instruct on the essential elements underlying Badalamente's conviction. *Cf. Screws* v. *United States,* 325 U.S. 91, 107 (1945) and there was no plain error. F.R. Crim. P. 30; *United States* v. *Cacchillo,* 416 F.2d 231, 234 (2d Cir. 1969); *United States* v. *Indiviglio,* 352 F.2d 276, 280-81 (2d Cir. 1965), *cert. denied,* 383 U.S. 907 (1966).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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MICHAEL C. EBERHARDT
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That on the 11th day of July 1974 he served 2 copies of the within appellate brief for the Government by placing the same in a properly postpaid franked enveloped addressed:

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Michael C. Eberhardt

Sworn to before me this
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J Lawrence